FILE COPY

Office, Supreme Court, U.S.
FILED
JUL 6 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 215

PETER JOSEPH, also known as PETE JOSEPH,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

STANFORD SHMUCKLER,
JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.
Attorneys for Petitioner.

INDEX.

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions, Statutes and Rules Involved	3
Statement of the Case	5
Reasons for Granting the Writ	10
Conclusion	27
Appendices:	
A. Opinion of United States Court of Appeals (Nos. 13,150, 13,151)	1a
B. Judgment of United States Court of Appeals (No. 13,150)	3a
Judgment of United States Court of Appeals (No. 13,151)	4a
C. Sur Petition for Rehearing (Nos. 13,150, 13,151)	5a

CITATIONS.

Cases:

	Page
Agnello v. United States, 269 U. S. 20 (1925)	19
Amos v. United States, 255 U. S. 313 (1921)	24
Burdeau v. McDowell, 256 U. S. 465 (1921)	21, 23
Byars v. United States, 273 U. S. 28 (1926)	20
Christensen v. United States, 259 F. 2d 192 (D. C. Cir. 1958)	13
Draper v. United States, 358 U. S. 307 (1959)	11
Elkins and Clark v. United States, 28 U. S. L. Week 4567 (U. S. S. Ct. June 27, 1959)	10, 19, 23, 24
Fraternal Order of Eagles, No. 778 v. United States, 57 F. 2d 93 (3rd Cir. 1932)	20, 21
Harris v. United States, 331 U. S. 145 (1947)	20
Hester v. United States, 265 U. S. 57 (1924)	24
Giacona v. United States, 257 F. 2d 450 (5th Cir. 1958)	13
Giordenello v. United States, 357 U. S. 480 (1958)	11, 12, 13
Gouled v. United States, 255 U. S. 298 (1921)	19
Jones v. United States, 362 U. S. 258, 4 L. ed. 2d 697 (1960) JONES v. U.S. 2ND SMITH, 357 U.S. 493 (1958)	10, 11, 12, 13, 15, 16
Levin v. Blair, 17 F. 2d 151 (E. D. Pa. 1920)	18
Mellet & Nichter v. United States, 296 Fed. 765 (E. D. Pa. 1923)	18
Merritt v. United States, 249 F. 2d 19 (6th Cir. 1957)	13
Rowley v. Rice, 11 Metcalf (Mass.) 337 (1946)	18
Stork Restaurant Corp. v. McCampbell, 55 F. 2d 687 (S. D. N. Y. 1932)	18
Takahashi v. United States, 143 F. 2d 118 (9th Cir. 1944)	18
United States v. American Brewing Co., 296 Fed. 772 (E. D. Pa. 1924)	18
United States v. Bell, 126 F. Supp. 612 (D. C. D. C. 1955), affirmed sub nom. Woods v. United States, 240 F. 2d 37 (D. C. Cir. 1956)	16
United States v. Bush, 172 F. Supp. 818 (E. D. Tenn. 1958)	20
United States v. Calamaro, 354 U. S. 351 (1957)	25

CITATIONS (Continued).

Cases (Continued):

	Page
United States v. Clancy, — F. 2d — (7th Cir. 1960)	13
United States v. Guerrina, 122 F. Supp. 126 (E. D. Pa. 1953)	20, 21
United States v. Kahriger, 345 U. S. 22 (1953)	10, 25, 26
United States v. Lefkowitz, 285 U. S. 452 (1932)	20
United States v. Mitchneck, 2 F. Supp. 225 (M. D. Pa. 1933)	21
United States v. Pearce, 275 F. 2d 318 (7th Cir. 1960)	13, 15
United States v. Rabinowitz, 339 U. S. 56 (1950)	19
United States v. Reckis, 119 F. Supp. 687 (D. Mass. 1954)	21
United States v. $4,298.80, 179 F. Supp. 251 (D. Md. 1959)	20
Weeks v. United States, 232 U. S. 382 (1914)	19, 20
Work v. United States, 243 F. 2d 660 (D. C. Cir. 1957)	24
Worthington v. United States, 166 F. 2d 557 (6th Cir. 1948)	13

Statutes and Regulations:

	Page
Fourth Amendment	3
Internal Revenue Code of 1954:	
§ 4401	3, 24
§ 4411	3, 24
Title 26 U. S. C. § 4411	5
Federal Rules of Criminal Procedure:	
Rule 41	4
Rule 41(c)	15
28 U. S. C. § 1254(1)	1

Miscellaneous:

	Page
Comment, 101 U. of Pa. L. Rev. 877 (1953)	26

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1959.

No.

PETER JOSEPH, ALSO KNOWN AS PETE JOSEPH,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Peter Joseph, your petitioner, prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on May 16, 1960.

OPINION BELOW.

The opinion of the court below has not been officially reported (Appendix A, *infra*, p. 1a).

JURISDICTION.

The judgments of the Court of Appeals were entered on May 16, 1960 (Appendix B, *infra*, p. 3a). A petition for rehearing was denied June 6, 1960 (Appendix C, *infra*, p. 5a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Where an affidavit to a search warrant consists entirely of uncorroborated hearsay statements of an informant and does not set forth any basis for the affiant's belief in the informant's reliability, did the Commissioner abuse his discretion in concluding that there was probable cause for issuing the warrant?

2. Where a warrant is issued directing a search of a private home in the daytime, and where the search is commenced at four P. M., but where the search of portions of the premises does not commence until nighttime, does the admission against petitioner of evidence obtained during the later search violate the Fourth Amendment and the Federal Rules of Criminal Procedure?

3. Did the execution of a search warrant, the search of petitioner's private home, the seizure of property and its use here, constitute an unlawful search and seizure in violation of the Fourth Amendment?

4. Where personal records have been obtained from petitioner by a paid Government informant, by means of theft or subterfuge, solely for the purpose of instituting a Federal proceeding, may the Government validly make use of such records as the basis for a search warrant and as evidence against petitioner at his trial?

5. Are the federal occupational tax on wagering and the excise tax of ten percent on the amount of all wagers constitutional?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

1. The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. § 4401 of the Internal Revenue Code of 1954 provides in pertinent part as follows:

"(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

* * * * * * * * * * * * *

"(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him."

3. § 4411 of the Internal Revenue Code of 1954 provides in pertinent part as follows:

"§ 4411. Imposition of tax.

"There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax

under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

4. Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

"(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

* * * * * * * * * * * *

"(e) Motion For Return of Property And To Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that . . . (4) there was not probable cause for believing the existence of the grounds on which the warrant was

issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

STATEMENT OF THE CASE.

Petitioner Peter Joseph was tried by the Honorable George A. Welsh, District Judge, sitting without a jury, who found petitioner guilty on two counts of Criminal Information No. 19673, charging him with failure and wilful failure to pay the special occupational tax on wagering imposed under Title 26 U. S. C. § 4411, and on thirty counts of Criminal Information No. 19768, charging him with wilful failure to file an excise tax return for each of the thirty months over the period from January, 1956 to June, 1958 (R. 10a to 13a).[1] On December 29, 1959, petitioner was sentenced to pay a fine of $1000 on each of the two counts on Information No. 19673 and to pay a fine of $1000 each on Counts 1, 13 and 15 of Information No. 19768, with concurrent sentences of thirty days on each of those three counts, the execution of the prison sentences being suspended, and sentences on all remaining counts of Information No. 19768 being suspended (R. 227a).

1. "R" refers to the appendix filed by the petitioner in the court below and there designated Appellant's Appendix, a copy of which has been certified to this Court.

On June 20, 1958, the United States Commissioner, Henry P. Carr, issued two separate search warrants for the search of premises 209 Court Terrace, Pottsville, Schuylkill County, Pennsylvania, and 523 Minersville Street, Pottsville, Schuylkill County, Pennsylvania. Each warrant was issued on the basis of affidavits sworn to before the Commissioner by Internal Revenue Special Agent John J. Chiovero, which recited the following:

> "On June 19, 1958 a confidential informant, whom I believe to be reliable, appeared before me and made a statement under oath, that Pete Joseph of Pottsville, Schuylkill County, Pennsylvania, has been engaged in the business of accepting wagers (numbers lottery) during the years 1956, 1957 and 1958 on the premises known as 209 Court Terrace and on the premises known as 523 Minersville Street, both located in Pottsville, Schuylkill County, Pennsylvania; that he has personally observed said Pete Joseph accept numbers bets from many persons during the years 1956, 1957 and 1958; and that he has personally observed said Pete Joseph make records of numbers bets during the years 1956, 1957 and 1958.
>
> "I have personally examined and have in my possession a day book record reflecting daily receipts and payments on wagers for the period from January, 1956 through April, 1958 and approximately 1431 betting slips covering numerous wagers (numbers lottery) during the months of April and June 1958. This day book and these betting slips have been identified to me by a reliable informant as being the property of Pete Joseph and as being records of numbers lottery bets accepted by the said Pete Joseph and his employees.
>
> "On June 19, 1958, I personally examined the records of the Collection Division, Office of the District Director of Internal Revenue, Philadelphia, Pennsylvania, relating to the registration, filing of returns and

payment of the occupational tax imposed on persons engaged in the business of accepting wagers and found no record in the name of Pete Joseph or Peter Joseph or any person whose address was given as 523 Minersville Street, Pottsville, Pennsylvania, or 209 Court Terrace, Pottsville, Pennsylvania." (R. 6a-7a)

On June 21, 1958 at about 4:00 P. M., a number of special agents appeared at premises 209 Minersville Street and proceeded to execute the search warrant issued for the premises 209 Court Terrace (R. 16a, 43a, 47a, 51a). A part of the premises searched was occupied by the petitioner Peter Joseph, another part by his brother, Michael Joseph, and sister-in-law, Julia Joseph, and still another part by Mr. and Mrs. William Tidmore and their child (R. 19a, 20a, 46a). The agents commenced a search and remained on the premises until approximately 10:45 P. M. (R. 26a, 43a, 45a, 47a, 51a). During that time no one was permitted to leave; the only ones permitted to enter were petitioner and his brother (R. 16a, 26a, 45a, 50a). Petitioner's attorney was also admitted to the premises, but was initially prevented from talking to the petitioner and was permitted to talk to his client only when he promised to instruct his client to cooperate by permitting the agents to open a safe (R. 33a, 65a). Most of the agents were armed, and some had handcuffs (R. 17a, 42a 43a, 44a, 48a). Petitioner was told that if he would not open a safe which was found concealed in a closet of his bedroom, it would be broken with a crowbar (R. 33a-34a, 49a, 65a-66a). Petitioner complied with the demand and a substantial quantity of money was removed from the safe (R. 34a, 48a, 49a, 66a). Money was also removed from the quarters of the other occupants (R. 44a). Neither money nor a safe were mentioned in the search warrant.

A motion for the return of the seized property and suppression of evidence was filed, testimony was taken before Honorable John W. Lord, Jr., briefs were filed and

argument was held, and the motion was denied (R. 69a). At the trial, petitioner's counsel renewed his motion for suppression of the evidence and moved to strike from the record all the evidence improperly obtained in violation of petitioner's constitutional rights (R. 81a, 85a-87a). Those motions were denied on the basis of Judge Lord's opinion (R. 83a-87a).[2]

Except for the testimony of Internal Revenue Agents to the effect that they had searched the records and found that petitioner had never filed returns nor paid the special occupational tax on wagering, and their testimony as to the evidence obtained by search and seizure and the circumstances thereof, the Government's entire case was based on the testimony of an informer, Mahlon Lauer, on records turned over to the Government by that informer, and money, slips and so forth seized on petitioner's premises. That informer's testimony was replete with contradictions; however, the gist of his testimony was that he had worked for the petitioner at various periods of time from January, 1956 to June, 1958, including two months at the end of 1956, not at all during 1957, and from January to May, 1958 (R. 36a, 103a). He testified that petitioner was conducting a numbers business at 209 Court Terrace and had a financial interest in the numbers business being conducted at 523 Minersville Street. The informer admitted that the lease for premises 523 Minersville Street was in his name and that he had obtained a local mercantile license to operate a business at that address and that he lived there (R. 137a). He testified that he gave up a job paying a salary of $5,300 a year with the Reading Railroad to return to work for the petitioner, with the sole purpose in mind of obtaining evidence to be turned over to the Government so that the informer could obtain a finder's fee or reward (R. 139a). He testified that he preserved some of the

2. This opinion has been published in 174 F. Supp. 539 (E. D. Pa. 1959).

books and records given to him by petitioner to destroy, *solely for the above purpose* (R. 29a, 111a, 156a-158a).

The informer did not discuss this with the agents, including the agent who swore to the affidavit, until June 19, 1958 (R. 163a). At that time he was paid $100 by the Internal Revenue Agents for his information, and promised $900 more after its evaluation, which sum was subsequently paid (R. 141a, 149a, 164a). He made statements under oath in which he recited that he had not been promised reward, full knowing that he had been promised a reward, and was making the statements solely to obtain money from the Government (R. 158a-159a, 168a-173a). He admitted that he had considered blackmailing the petitioner (R. 143a-144a). He further admitted that his sole motive for informing was to obtain money, and that it was to his financial advantage to prove petitioner liable for a large amount of taxes (R. 112a).

The Trial Judge, concluding that the informer "displayed a lack of honor that you would not expect even from a Judas" and stating "If it had not been for some corroborating evidence of a documentary nature, his entire testimony would have lacked credibility," nevertheless was convinced that the informer was telling the truth (R. 225a). He found the petitioner guilty on all counts.

REASONS FOR GRANTING THE WRIT.

Just this March, in *Jones v. United States*, 362 U. S. 258, 4 L. ed. 2d 697 (1960), this Court clarified previous decisions defining the probable cause necessary for issuing a search warrant under the protections accorded by the Federal Rules of Criminal Procedure implementing the Fourth Amendment. Here the Court of Appeals, purportedly applying that decision, extends it far beyond the intendment of this Court and permits the Commissioner to give credence to hearsay statements of an anonymous informer without corroboration of those statements and without evidence of the reliability of that informer, other than the agent's allegation, which was actually a mis[redacted]tation—both of which are expressly required under the doctrine enunciated in the *Jones* case.

Additionally, the facts of this case present a novel problem in the interpretation of the provisions of the Federal Rules and of the Fourth Amendment pertaining to execution of search warrants in the daytime, never before passed upon by this Court, but having widespread applicability. Furthermore, the conduct of the enforcement officials in executing this search warrant, impliedly sanctioned by the silence of the Court of Appeals, was illustrative of police state methods of a type so frequently repudiated by this Court. Also, this case raises the question of whether this Court's recent decision in *Elkins and Clark v. United States*, 28 U. S. L. Week 4567 (U. S. S. Ct. June 27, 1959), prevents the Government from utilizing as the basis for a search warrant and at a subsequent trial evidence obtained by a paid informer, whose conduct was ratified and paid for by the Government, when he employed the type of trickery and subterfuge which this Court has frequently rejected when employed by Government officials.

Lastly, this Court has never expressly sustained the constitutionality of the statute under which petitioner was convicted. Although in *United States v. Kahriger*, 345 U. S. 22 (1953), this Court upheld the portion of the Internal

Revenue Code requiring persons in the business of accepting wagers to register and to pay a $50 annual tax, the validity of that portion of the Code requiring such persons to pay a tax of ten percent of the gross amount of all wagers received was not there involved and has never been passed upon by this Court.

For all of these reasons set forth in more detail below, this Court should review petitioner's conviction.

I.

In *Jones v. United States*, *supra*, this Court sanctioned the use of hearsay evidence as a basis of issuing a search warrant, thereby extending the doctrine of *Draper v. United States*, 358 U. S. 307 (1959), which had approved the use of hearsay as sufficient probable cause for making arrests without a warrant. But *cf. Giordenello v. United States*, 357 U. S. 480 (1958), where this Court refused to decide whether an arrest warrant may be issued *solely* on hearsay information, since it found the complaint defective in failing to set forth a sufficient basis for a finding of probable cause. Even in the *Jones* case this Court underscored the necessity for *corroboration* of the hearsay evidence, stating:

> "We held in *Nathanson v. United States*, 290 U. S. 41, that an affidavit does not establish probable cause which merely states the affiant's belief that there is cause to search, without stating facts upon which that belief is based. *A fortiori* this is true of an affidavit which states only the belief of one not the affiant. That is not, however, this case. The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another. An affidavit is not to be deemed insufficient on that score, *so long as a substantial basis for crediting the hearsay is present.*

> "In testing the sufficiency of probable cause for an officer's action even without a warrant, we have held that he may rely upon information received through an informant, rather than upon his direct observations, *so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge.* Draper v. United States, 358 U. S. 307." 4 L. ed. 2d at 707. (Emphasis supplied.)

In the case at bar there was nothing before the Commissioner who issued the warrant but uncorroborated hearsay. The affiant was the Internal Revenue Agent, who had no personal knowledge of the petitioner's alleged gambling activities. He knew only that petitioner had no tax stamp. The only source of information for his belief that petitioner was engaged in gambling, and therefore was required under the Internal Revenue Laws to have a stamp, came from the statement of Mahlon Lauer, an informant previously unknown to the Government who demanded payment prior to cooperating. This informer did not appear before the Commissioner. The books and slips the informant allegedly identified to the affiant as belonging to the petitioner were not shown to the Commissioner. Thus, there was nothing before the Commissioner but uncorroborated hearsay, which has never been held by this Court to be sufficient for issuing search or arrest warrants. See *Giordenello v. United States*, *supra*. The *Jones* case did not limit the Fourth Amendment protections that greatly.

The only checking done by Internal Revenue Agents and offered by the Government as alleged corroboration of the hearsay statements (Appellee's Brief p. 8) were the discussions the affiant had with other agents (R. 58a); the checking of the address given in petitioner's return (R. 59a); and the results of surveillance conducted by other agents (R. 59a).

(a) The affiant checked with his superior and learned that petitioner was listed in a file of "racketeers and known gamblers and so on". (R. 58a). Not only was this in turn

uncorroborated hearsay, such as was rejected in *United States v. Pearce*, 275 F. 2d 318 (7th Cir. 1960), but this information was not even offered to the Commissioner who issued the warrant.

(b) The checking of petitioner's address certainly has no evidentiary value on the question of petitioner's gambling activities or his reliability for tax.

(c) Not only were the results of the surveillance inconclusive and insufficient to constitute corroboration of the hearsay, but the affiant did not even know the results of that investigation at the time he appeared before the Commissioner who issued the warrant.

Therefore, the Commissioner abused his discretion in issuing the warrant on the sole basis of uncorroborated hearsay. See *Giordenello* case, *supra*; *cf. Merritt v. United States*, 249 F. 2d 19 (6th Cir. 1957). The federal courts have uniformly concluded that warrants may issue on the basis of hearsay evidence *only* if corroborated. See, *e.g.*, *Christenson v. United States*, 259 F. 2d 192 (D. C. Cir. 1958); *Giacona v. United States*, 257 F. 2d 450 (5th Cir. 1958); *United States v. Clancy*, — F. 2d — (7th Cir. 1960); *Worthington v. United States*, 166 F. 2d 557 (6th Cir. 1948); and cases therein cited.

Furthermore, the *Jones* case highlights this Court's requirement that the affidavit and the evidence before the Commissioner set forth some basis for determining the *reliability* of the informer. In that case the affiant not only swore to the reliability of the informant, but alleged facts on which that reliability could be gauged by the Commissioner. He swore that his informant had "given information to the undersigned on previous occasion [*sic*] and which was correct," as well as that the information had been corroborated by other sources of information. The Court concluded:

"It is not suggested that the Commissioner doubted Didone's word. Thus we may assume that Didone had the day before been told by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. Had that been all, it might not have been enough, but Didone swore to a basis for accepting the informant's story. *The informant had previously given accurate information. His story was corroborated by other sources of information.* And petitioner was known by the police to be a user of narcotics. Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale; that petitioner was a known user of narcotics made the charge against him much less subject to scepticism than would be such a charge against one without such a history.

"Petitioner argues that the warrant was defective because Didone's informants were not produced, because his affidavit did not even state their names, and Didone did not undertake and swear to the results of his own independent investigation of the claims made by his informants. If the objections raised were that Didone had misrepresented to the Commissioner his basis for seeking a warrant these matters might be relevant. Such a charge is not made. All we are here asked to decide is whether the Commissioner acted properly, not whether Didone did. We have decided that, as hearsay alone, does not render an affidavit insufficient, the Commissioner need not have required the informants or their affidavits to be produced, or that Didone have personally made inquiries about the apartment, so long as there was a substantial basis for crediting the hearsay." 4 L. ed. 2d, at 708. (Emphasis supplied.)

Here, although the agent stated in his affidavit that he believed the informant to be reliable, no facts were

alleged therein and none were presented to the Commissioner to substantiate the agent's bald statements. In fact, at the hearing on the motion to suppress, the affiant freely admitted that he had no basis for knowledge of the informant's reliability, that he had first met the informant the day before the affidavit was filed, that he had never had any previous contact with the informant, that he knew of no other Government agent who could vouch for the informant's reliability, and that they were so doubtful of his reliability that they refused to pay the full sum requested by the informant until the information was later evaluated (R. 61a-62a). Thus, the agent's statement of his belief in the reliability of the informant was an actual *misrepresentation* to the Commissioner, clearly within the exception enunciated in the *Jones* case, *supra*.

Also see *United States v. Pearce*, *supra*, where the Court held that information from an informer supplied to one F. B. I. agent, who told it to another, who passed it on to a third who took the affidavit, was insufficient to constitute probable cause for issuing a search warrant where the informant was not previously known to any of those agents.

This Court should therefore review the use of evidence based on the search warrant here involved in order to prevent an extension of the *Jones* case far beyond its intendment.

II.

Rule 41(c) of the Federal Rules of Criminal Procedure, implementing the Fourth Amendment's prescriptions concerning search warrants, provides that search warrants shall direct that they be served in the daytime unless the affidavits are positive that the property is on the person or in the place to be searched.

Here the affidavit was not *positive* and the search warrant accordingly directed a search in the daytime. The

agents admitted that they arrived at the premises at 4:00 P. M. and started their search at that time. They admitted further that they did not commence their search of the rear bedroom belonging to petitioner until approximately 7:00 or 7:15 P. M., and did not complete it until 9:30 or 10:00 P. M., although the safe was discovered approximately 8:30 or 9:00 o'clock P. M. (R. 32a-33a, 47a-48a). They admitted that they had discovered a large quantity of money in the front bedroom, Mrs. Tidmore's, at approximately 4:25 P. M., but did not count it until much later. Yet it must be noted that there were nine agents on the premises, some of whom were merely guarding doors (R. 16a); this was only a small three-story house, nothing interfered with their search, yet they did not enter the upstairs bedroom until hours after they had arrived on the premises.

This was not a case where a search was started late in the afternoon and because of necessity carried over into the evening, or where the inventorying of items discovered on the premises necessitated their remaining in the evening. See *United States v. Bell*, 126 F. Supp. 612 (D. C. D. C. 1955), *affirmed sub nom. Woods v. United States*, 240 F. 2d 37 (D. C. Cir. 1956).

Thus, the question is squarely posed of whether a daytime warrant authorizing a search of a three-story private residence can justify the agents remaining on the premises longer than necessary to complete the search started in the daytime, and the commencement of a separate search of other portions of the premises after nighttime had set in.

The District Judge, in denying petitioner's motion to suppress, relied for authority on *United States v. Bell*, *supra*. In the *Bell* case the search under a daytime search warrant issued on personal knowledge of officers that a numbers lottery was being conducted therein began at 4:30, but *because of the varied character and large amount of property seized*, the inventory of such property was not completed until 6:00 P. M. Evidence was offered by the defendant there to show that sunset occurred on that day

at 5:31 P. M. The Court concluded, "It was sufficient that the search began in the daytime although it continued after dark." *Id.* at 617. However, that Court did not indicate whether it was holding that a daytime warrant authorizes a search which continues into the nighttime, or whether it was subscribing to the view expressed in some courts that daytime does not necessarily end with the setting of the sun and the commencing of darkness.

Furthermore, it should be noted that in the *Bell* case the *search and seizure* actually occurred in the daytime, but the *inventorying* of the property necessitated the remaining until dark. *This is not true in the case at bar.* Nothing prevented the officers from commencing the search prior to 7:00 o'clock, and prior to the petitioner's arrival. There were nine police officers present, some just guarding doors. The actual search of the rear bedroom and the seizure of property therein did not even commence until nighttime.

This Court has intimated that a daytime search warrant expires with the arrival of nighttime. In *Jones v. United States*, 357 U. S. 493 (1958), this Court reversed a conviction based upon evidence obtained that the federal officers who, believing liquor was being unlawfully manufactured in defendant's home, obtained a daytime search warrant but waited outside and kept the house under surveillance until nighttime, when they arrested the operator of a truck that had just arrived, entered the house without using the warrant, conducted a general search of the house, and then arrested the defendant when he arrived home an hour later. The Court noted that during the hearing of defendant's motion to suppress the evidence the Government had conceded that "by the time the petitioner's house had been searched, that daytime warrant *had expired*, and it disclaimed any intention on the part of the Federal officers to execute it." *Id.* at 496 (emphasis supplied). The Court further noted ". . . it is difficult to imagine a more severe invasion of privacy than a nighttime intrusion into the private home." *Id.* at 498. These observations are

equally applicable here. It is difficult to imagine a more severe invasion than the entry of nine officers, many of whom were carrying weapons, into a private home at 4:00 P. M., their refusal to let anyone enter or leave the premises, the limitation they imposed on the petitioner's consultation with his attorney, and their remaining on the premises six and one-half hours, long into the nighttime.

Several other federal courts have concluded that officers serving a warrant have no right to remain on the premises for a longer time than is reasonably necessary to execute the warrants. See, *e.g.*, *United States v. American Brewing Co.*, 296 Fed. 772 (E. D. Pa. 1924); *Levin v. Blair*, 17 F. 2d 151 (E. D. Pa. 1920); *Mellet & Nicker v. United States*, 296 Fed. 765 (E. D. Pa. 1923); *Rowley v. Rice*, 11 Metcalf (Mass.) 337 (1946). *Cf. Stork Restaurant Corp. v. McCampbell*, 55 F. 2d 687 (S. D. N. Y. 1932) (where the court noted that it is a trespass to remain on the premises longer than necessary to remove the seized property without permission of the owners).

The authority to search should not be confused with the authority to seize or the power to use seized articles in evidence. See *Takahashi v. United States*, 143 F. 2d 118, 123 (9th Cir. 1944). Here the authority to search and to seize was limited to the daytime according to the terms of the warrant. The entry into the premises and search commenced at 4:00 o'clock; some of the seizures took place while it was still daytime. However, the seizure of the safe occurred at night. This was clearly not authorized by the warrant.

Thus, this Court should review the circumstances of the search here, to determine whether petitioner's rights under the requirements of the Federal Rules of Criminal Procedure and of the Fourth Amendment relating to daytime search warrants have been violated.

III.

This Court has always been zealous in protecting citizens from general exploratory searches and unreasonable

searches and seizures, such as prohibited by the Fourth Amendment. See *Elkins and Clark v. United States*, 28 U. S. L. Week 4567 (U. S. S. Ct. June 27, 1959), *Weeks v. United States*, 232 U. S. 382 (1914), *Gouled v. United States*, 255 U. S. 298 (1921), *Agnello v. United States*, 269 U. S. 20 (1925). In the issuance and execution of search warrants, there must be strict compliance with the formalities required by the Constitution and rules of procedure. Reviewing "the total atmosphere of the case," the execution of the warrant and the search here involved were unreasonable. *Cf. United States v. Rabinowitz*, 339 U. S. 56, 66 (1950). Nine officers, most of them armed, raided a private three-story home, remained on the premises for over six and one-half hours, allowed no one to enter but the petitioner and his brother, permitted petitioner's attorney to enter and to consult with petitioner under the condition that he persuade petitioner to open a safe not named in the warrant, and threatened to break open the petitioner's safe with a crowbar if not opened by petitioner. The District Judge concluded from the evidence that the searchers merely took the "usual and necessary precautions" to prevent interference with their search (R. 79a). But the officers freely admitted that at no time were they in danger, nor did they have any reason to expect danger (R. 49a-59a). The Court of Appeals did not comment upon this conduct. This Court should not permit such conduct to be sanctioned by silence.

Furthermore, among the items seized during this search were large sums of money taken from a safe, even though neither money nor a safe was mentioned in the affidavit or the search warrant. The District Judge concluded that the money was used and intended for use in violation of law (R. 77a). However, it should be noted that no criminal offense was committed in the presence of the officers; no arrest was made at the time of the execution of the warrant; at least none of the items in the safe were contra-

band, illegal or subject to forfeiture. *Boyd v. United States*, 273 U. S. 28 (1926). Therefore, those items were merely and solely of evidentiary value, and were not subject to seizure. *United States v. Lefkowitz*, 285 U. S. 452 (1932); *Gouled v. United States*, 255 U. S. 298 (1921). Also see *Harris v. United States*, 331 U. S. 145, 154 (1947).

There was no proof that the money here seized was part of gambling paraphernialia—this was money in a safe hidden away in a private home. *Cf. United States v. $1,298.80*, 179 F. Supp. 251 (D. Md. 1959).

Thus, this Court should review the circumstances of the execution of the warrant and the entire search and seizure involved here, to determine whether petitioner's constitutional rights have been violated.

IV.

This Court has frequently held that a search and seizure made subsequent to entry procured by stealth, fraud, through social acquaintance, or in the guise of a business call; is equally unreasonable and equally violative of constitutional rights as a search made subsequent to entry by force or violence. *Gouled v. United States*, 255 U. S. 298 (1921). In that case an Army investigator, a friend of the defendant, in the guise of a friendly call, visited defendant's office and took certain papers without a warrant, which he delivered to the United States Attorney, who offered them in evidence against the defendant. This Court reversed his conviction, concluding that the Fourth Amendment prohibits entry by stealth as well as by force, since both are against defendant's will, and that the admission of such evidence seized in violation of the Fourth Amendment constitutes a violation of the Fifth Amendment. Other federal courts have followed and applied this doctrine. See *Fraternal Order of Eagles, No. 778 v. United States*, 57 F. 2d 93 (3rd Cir. 1932); *United States v. Bush*, 172 F. Supp. 818 (E. D. Tenn. 1958); *United States v. Guerrina*,

122 F. Supp. 126 (E. D. Pa. 1953); *United States v. Reckis*, 119 F. Supp. 687 (D. Mass. 1954); *United States v. Mitchnock*, 2 F. Supp. 225 (M. D. Pa. 1933). In the *Fraternal Order of Eagles* case, *supra*, prohibition agents were admitted to a lodge by producing membership cards in a distant branch of that lodge. While in the lodge room they asked for, purchased and were served illegal drinks. Several days later they used that information as the basis for a search warrant. The Court of Appeals concluded that the search and seizure were unlawful. In the *Bush* case, *supra*, undercover government agents purchased whiskey from defendant's wife, then obtained a search warrant based on that purchase. The Court of Appeals suppressed the evidence obtained thereby, concluding that the agent's misrepresentation as to his residence and occupation constituted a subterfuge which violated the defendant's constitutional rights. In the *Guerrina* case, the only subterfuge employed was that an Internal Revenue agent who was auditing defendant's books was joined by another person whose identity was not disclosed to defendant, but who was in actuality a Special Agent; yet the federal court suppressed the evidence obtained thereby. In the *Mitchnock* and *Reckis* cases, *supra*, the misrepresentations were likewise designed only to conceal the identity of the agents and their true purpose in entering the properties. Certainly, the subterfuge and misrepresentations of Mahlon Lauer here were equally designed to lull and trick petitioner and were equally violative of his rights.

Almost four decades ago, however, this Court reached a contrary result where evidence was obtained by the fraud of private investigators, but where the Government was not a party to the fraud, even though the evidence was later turned over to the Federal authorities. In *Burdeau v. McDowell*, 256 U. S. 465 (1921), this Court reversed an order of the District Court restraining the Department of Justice or its agents from presenting to the Grand Jury

evidence secured as a result of knowledge obtained from the use of documents which were seized, as follows: Private detectives had been hired by a company to take possession of an office belonging to the company but occupied by its employee, who was suspected of fraudulent conduct in the course of the company's business. Those private detectives seized not only the company's books and records, but some of the employee's private papers, all of which documents were subsequently turned over to a Special Assistant of the Attorney General, who intended to present them to the Grand Jury to have the employee indicted for violation of federal law. This Court concluded that no official of the Federal Government had anything to do with the wrongful seizure of petitioner's property or any knowledge thereof until several months after the property had been taken from him and was in the possession of his employer. The majority of the Court concluded that the Fourth Amendment prevents only governmental action of this type. Justices Brandeis and Holmes dissented, noting: "Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."

In the case at bar, although the records were not seized by a Government official or by anyone acting with the Government's knowledge, Mahlon Lauer, the Government's informant, frankly admitted that he had gone to work for petitioner in 1958 solely to develop sufficient evidence to inform against the petitioner and that he seized the records for the sole purpose of using them to initiate a federal criminal prosecution (R. 139a). He even admitted that he gave up a $5,300 a year job to work for whatever petitioner would pay him, which did not exceed $50 a week, in order to obtain evidence as a basis for proceeding against the petitioner. The informant further admitted that all of the records he presented to the Internal Revenue Agents, which were the sole foundation for Mr. Chiovero's affidavit for the search warrant, were given to him by petitioner to be

destroyed, and that he, the informant, saved them for the sole purpose of turning them over to the Internal Revenue agents. *The Government agents knew this when the evidence was turned over to them. They knew this when they used that evidence as the basis for a search warrant to obtain further evidence. They even paid for the use of such evidence.*

To permit the Government to use such evidence is to permit it to become a party to a crime and to adopt and ratify the acts of a criminal and to make use of the fruit thereof. This is not the case of a law-abiding citizen who discovers evidence of a crime and then turns it over to the proper law enforcement officials. This was an example of a criminal act initiated and carried out by a party to the offense for greedy motives. In fact, it can be said that the Government in effect instigated this conduct by its policy of offering informer's fees and rewards to such an individual and then ratified his conduct by paying such a reward.

Very recently this Court held "... that evidence obtained by state officers during a search, which if conducted by federal officers would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial." *Elkins and Clark v. United States, supra*, 28 U. S. L. Week, at 4572.

It is respectfully submitted that this Court should likewise not permit the Government to use evidence obtained by a paid informer in a manner which, if employed by federal officers, would have violated the petitioner's immunity from unreasonable searches and seizures under the Fourth Amendment. It is "not seemly for a federal court to allow the Department of Justice to be the knowing beneficiary of stolen goods." 28 U. S. L. Week, at 4583, Justice Frankfurter dissenting in the *Elkins* case, referring to the dissent of Justices Holmes and Brandeis in the *Burdeau* case.

Furthermore, the Government not only helped induce this treachery, ratified it, paid for it, and used the evidence obtained thereby, but it even helped perpetrate a falsehood concerning the manner in which it was obtained. The Government agents took the informant's statement (R. 55a) on a regular form affidavit (R. 168a) in which the informant swore he made the statement "freely and voluntarily, without any threats or rewards, or promise of reward"—although the informant gave the information in the expectation of a reward, pursuant to an oral agreement with the Government agents (R. 168a).

Nor was the evidence abandoned by the petitioner, as in *Hester v. United States*, 265 U. S. 57 (1924). See *Work v. United States*, 243 F. 2d 660 (D. C. Cir. 1957). On the contrary, according to the informant's own testimony, these records were either stolen by him or were given by the petitioner to the informant for a specific purpose, namely, their destruction (R. 29a, 110a-112a). This Court has held that even a wife may not waive her husband's constitutional rights by permitting a search and seizure of his property in his absence. *Amos v. United States*, 255 U. S. 313 (1921). Yet to permit the Government to use the evidence misappropriated by the informant from the petitioner, and in a manner directly contrary to petitioner's wishes and instructions, would be "dirty business".

Therefore, this Court should review the circumstances under which the evidence was obtained here, to determine whether the use of this evidence in the trial violated the doctrine so recently enunciated in *Elkins and Clark v. United States, supra.*

V.

Section 4401 of the Internal Revenue Code of 1954, 26 U. S. C. § 4401, provides an excise tax on wagers equal to ten percent of the amount thereof, including all charges incident to the placing of such wagers, and making liable for those taxes each person who is engaged in the business of accepting wagers. Section 4411 of that Code, 26 U. S. C.

4411, imposes a special tax of $50 a year to be paid by each person liable for the excise tax, or who is engaged in receiving wagers for or on behalf of any person so liable.

In *United States v. Kahriger*, 345 U. S. 22 (1953), a divided Court upheld the constitutionality of the annual $50 special occupational tax as a revenue measure on its face. The Court there noted that some income was derived from the occupational tax; in fact, more than has been derived from the narcotics and firearms taxes, which had previously been held valid. *Id.* at 28.

However, this Court has not yet passed upon or sustained the validity of the ten percent excise tax provisions. Nor has it considered the validity of either provision in light of subsequent history of the cost of collecting those taxes in relation to the revenue obtained therefrom.

Actual events have shown that very little has been collected by the United States under the ten percent excise tax provisions since the passage of this Act in 1951. The income collected has fallen far short of the government's estimate at that time (R. 88a-89a, 217a-229a). Further, the costs of collection have almost equalled or exceeded the amount of revenue so obtained. This substantiates the charge that the Act was passed for the purpose of controlling the evil of gambling rather than as a revenue measure.

The application of the special occupational tax has been limited in order to save its constitutionality. See *United States v. Calamaro*, 354 U. S. 351 (1957), where it was held not to apply to a numbers "pick-up" man. This Court noted specifically:

> "We can give no weight to the Government's suggestion that holding the pick-up man to be not subject to this tax will defeat the policy of the statute because its enactment was 'in part motivated by a congressional desire to suppress wagering'. The statute was passed, and its constitutionality was upheld, as a revenue measure, United States v. Kahriger, 345 U. S. 22, 97 L. Ed.

754, 73 S. Ct. 510, and, apart from all else, in construing it we would not be justified in resorting to collateral motives or effects which, standing apart from the federal taxing power, might place the constitutionality of the statute in doubt." *Id.* at 358.

It is respectfully submitted that actual experience has shown the measure nominally designated as a revenue measure is, in actual fact, effective only as a regulation of an activity not within the power of Congress to regulate.

No federal tax which has ever been sustained has been as burdensome as this one. If Congress were to levy a tax of ten percent on gross receipts from a legitimate occupation without deduction for charges incident thereto, can there be any doubt that the Court would consider it to be a deprivation of property without due process and denial of equal protection? The mere fact that such a tax was imposed on activities which are illegal in the various states, evidences the prime, if not sole, intent of Congress to regulate this activity, rather than to derive income. *See Comment*, 101 U. OF PA. L. REV. 877 (1953).

Furthermore, one would have to give evidence to incriminate himself by applying for a wagering stamp as a condition of being in business, in violation of the Fifth Amendment.

Therefore, this Court should at this time examine the constitutionality of § 4401 and re-examine its decision in the *Kahriger* case concerning the constitutionality of § 4411 on its face. Now that the actual operation of the statute there considered *in vacuo* has become apparent, the time seems ripe for a shifting from judgment by speculation to judgment by experience.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

STANFORD SHMUCKLER,
JACOB KOSSMAN,
1323 Spruce Street,
Philadelphia 7, Pa.,
Attorneys for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13,150
13,151

UNITED STATES OF AMERICA

v.

PETER JOSEPH, ALSO KNOWN AS PETE JOSEPH,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued May 5, 1960

Before: KALODNER, HASTIE and FORMAN, *Circuit Judges.*

OPINION OF THE COURT

(Filed May 16, 1960)

PER CURIAM:

These appeals are from convictions on charges of willful failure to pay the special occupational tax on wagering and willful failure to file excise tax returns on wagers. We are satisfied that the guilt of the accused was adequately established at the trial and that the record reveals no reversible error.

Most of the issues presented on these appeals concern the issuance and execution of a search warrant which

yielded important evidence against appellant. A principal objection challenges the use of hearsay evidence in determining probable cause for the issuance of the warrant. The propriety of this course is now clearly established by the decision of the Supreme Court in *Jones v. United States*, — U. S. —, decided March 28, 1960. Beyond the propriety of considering such hearsay, we are satisfied that the totality of the circumstances brought to the attention of the issuing officer made it reasonable for him to credit and believe the basic hearsay assertion that the place to be searched was being used for conducting a wagering business.

We have also considered that the search warrant authorized a daytime search and that the actual searching of the premises in question, which began about four o'clock in the afternoon, was not completed until after ten o'clock at night. However, the evidence does not show that the search made after nightfall was more than a reasonable continuation of the search which began in the afternoon. On the present record the conduct of the searching officers was within the authorization of the warrant.

No other point requires discussion. We do, however, make explicit our conclusion that, in the light of *United States v. Kahriger*, 1953, 345 U. S. 22, there is no merit in an attack which the appellant makes on the constitutionality of the wagering statute.

Conviction and sentence will be affirmed.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,150

UNITED STATES OF AMERICA

v.

PETER JOSEPH, ALSO KNOWN AS PETE JOSEPH,
Appellant.

(19673 Criminal)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: KALODNER, HASTIE and FORMAN, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

May 16, 1960

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,151

UNITED STATES OF AMERICA

v.

PETER JOSEPH, ALSO KNOWN AS PETE JOSEPH,
Appellant.

(1976S Criminal)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: KALODNER, HASTIE and FORMAN, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

May 16, 1960

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13,150
13,151

UNITED STATES OF AMERICA

v.

PETER JOSEPH, ALSO KNOWN AS PETE JOSEPH,
Appellant.

SUR PETITION FOR REHEARING.

Present: KALODNER, HASTIE and FORMAN, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT

WILLIAM H. HASTIE,
Circuit Judge.

Dated: June 6, 1960

FILE COPY

Office Supreme Court, U.S.
FILED
AUG 4 1960
JAMES R. BROWNING, Clerk

No. 215

In the Supreme Court of the United States

OCTOBER TERM, 1960.

PETER JOSEPH, also known as PETE JOSEPH,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM RICHARD WILKEY,
Assistant Attorney General,

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and Rule involved	2
Statement	3
Argument	10
Conclusion	11

CITATIONS

Cases:

Draper v. *United States*, 358 U.S. 307	10
Hester v. *United States*, 265 U.S. 57	13
Jones v. *United States*, 362 U.S. 257	10
Palermo v. *United States*, 360 U.S. 343	13
United States v. *Bell*, 126 F. Supp. 612	12
United States v. *Kahriger*, 345 U.S. 22	11
United States v. *Leveson*, 262 F. 2d 659	13
United States v. *Lubrich*, 55 F. 2d 341	12
United States v. *$1,508.40*, 158 F. Supp. 916	13
United States v. *$2,222.40*, 157 F. Supp. 300	13
United States v. *$1,298.80*, 179 F. Supp. 251	13

Statutes:

26 U.S.C. 4401	2
26 U.S.C. 4412(a)	3
26 U.S.C. 7623	4, 13

Rule:

Rule 41, F. R. Crim. P.	4, 11

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 215

PETER JOSEPH, also known as PETE JOSEPH,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not yet reported. The opinion of Judge Lord, in the district court, denying the motion to suppress evidence (R. 69-79), is reported at 174 F. Supp. 539. The opinion of Judge Welsh, before whom the case was tried without a jury (R. 221-225), is not reported.

JURISDICTION

The judgments of the court of appeals were entered on May 16, 1960. Petitioner's motion for a rehearing was denied on June 6, 1960 (Pet. 5a). The petition for a writ of certiorari was filed on July 6, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the search warrant was supported by a sufficient affidavit.

2. Whether there was compliance with the requirement of Rule 41(c), F. R. Crim. P., that search warrants be served in the daytime.

3. Whether the search was properly conducted.

4. Whether evidence obtained through informants, as authorized by Congress, should be ordered excluded by this Court in the exercise of its rule-making power.

5. Whether the federal tax on wagering is constitutional.

STATUTES AND RULE INVOLVED

1. 26 U.S.C. 4401 provides:

> (a) *Wagers.*
>
> There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.
>
> (b) *Amount of wager.*
>
> In determining the amount of any wager for the purposes of this subchapter, all charges in-

cident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) *Persons liable for tax.*

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

2. 26 U.S.C. 4412(a) provides:

Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

3. 26 U.S.C. 7623 provides:

The Secretary or his delegate, under regulations prescribed by the Secretary or his delegate, is authorized to pay such sums, not exceeding in the aggregate the sum appropriated therefor, as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law.

4. Rule 41, F. R. Crim. P., provides in pertinent part:

(c) *Issuance and Contents:* A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be

served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

* * * * *

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. * * *

STATEMENT

Petitioner was charged, under an information consisting of two counts, with failure to pay the special occupational tax on receiving wagers[1] and, under a second information consisting of thirty counts, with willful failure to file an excise tax return on wagers[2] in each of thirty months covering a period from January, 1956, to June, 1958 (R. 10-13). After waiving a jury, petitioner was tried before the court in

[1] See 26 U.S.C. 4412.

[2] See 26 U.S.C. 4401.

the Eastern District of Pennsylvania and was found guilty on all counts (R. 221-225). He was sentenced to pay a fine of $1,000 on both counts of the first information, or a total of $2,000 (R. 226). On each of three counts of the second information petitioner was sentenced to pay a fine of $1,000, or a total of $3,000, and to concurrent terms of imprisonment for thirty days, with execution suspended. Sentence was suspended on the remaining counts of this information (R. 227). The court of appeals affirmed (Pet. App. 1a-2a).

Prior to the trial, petitioner moved to suppress as evidence the fruits of a search of his property at 209 Minersville Street in Pottsville, Pennsylvania, made on June 21, 1958 (R. 14).[1] At the hearing on the motion to suppress before Judge Lord and at the trial before Judge Welsh, sitting without a jury, the following facts appeared:

1. On June 19, 1958, at about 9:30 or 10:00 a.m., Mahlon H. Lauer went to the office of the Intelligence Division of the Treasury Department at Camden, New Jersey, and talked with Special Agent Chiovero. Lauer wanted to be paid for information he could

---

[1] Actually, there were two search warrants covering two places of business, also used for residential purposes, in Pottsville, but it was understood that the same considerations applied to both (R. 70). 209 Minersville Street (or 209 Court Street or Terrace, the two streets being continuations of each other) was a small store, behind and above which were rooms used for gambling and for residential purposes. It was owned and operated by petitioner. 523 Minersville Street was a similar establishment operated by Lauer, the informant, under the supervision of petitioner.

give relating to petitioner's gambling activities in Pottsville (R. 35, 56-57, 157). Lauer had worked for petitioner and had received some gambling records from him, with instructions to destroy them, on a recent occasion when it had been rumored that internal revenue agents were going to be in town. Lauer had burned part of them, but had retained some numbers slips and a ledger book kept by petitioner, which he showed to Agent Chiovero (R. 109-113).

With Lauer's permission, Chiovero took the records to be inspected by the chief of the Intelligence Division in Philadelphia. It developed that several of the agents knew that petitioner was reputed to be engaged in gambling. The files showed that petitioner had admitted that he was a gambler when he was under prosecution in 1952 for income tax evasion. The address given by Lauer as the home and place of business of petitioner was also checked and found to correspond with that given on petitioner's income tax return. Two agents were assigned to observe whether there was activity at the two addresses where petitioner was said to be operating (R. 57-59). Chiovero testified that the purpose of this investigation was to determine whether the information offered by Lauer was reliable (R. 60).

Chiovero returned to Camden and took Lauer's affidavit (R. 22). Lauer stated in the affidavit that he had been employed in the numbers business by petitioner at the two addresses in question from January to May, 1958; that he had submitted to the agents a ledger book containing a record of peti-

tioner's numbers business during 1956 and 1957, in which he had seen petitioner make entries, and a quantity of numbers slips; that these had been turned over to him by petitioner for the purpose of being destroyed (R. 54-55).

The affidavit stated on the printed form that the statement was made freely and voluntarily, without any threats or rewards, or promises of reward having been made in return therefor (R. 55). Lauer testified that he was not promised anything in return for his statement, but he did it with the thought that he was going to receive a reward; he would not have gone to Pottsville in the first place and gone through all this trouble if there had been no hope of reward (R. 156-157). He stated that he received $1,000 in July (R. 149). Special Agent Morris testified that it was understood that Lauer was to be paid for his information at the time he made his affidavit, although the amount was not then agreed upon; that Lauer received $100 on June 23, in accordance with this agreement, and $900 on July 25 (R. 164-176).

The following day, June 20, having received information through his superior that the two agents had reported activity at the two addresses, Agent Chiovero applied for search warrants. He gave in support his affidavit that he had reason to believe that on the premises named there were concealed betting slips, run down sheets, records and other paraphernalia and equipment used and intended for use in violation of the statutes relating to gambling; that his reason for so believing was that on June

19, 1958, a confidential informant, believed by him to be reliable, had informed him that he had seen petitioner take numbers bets and had identified records of such transactions kept by petitioner; that investigation showed that petitioner had not complied with the law requiring registration, filing of returns and payment of the occupational tax on persons engaged in the business of accepting wagers (R. 6-7).

2. The search warrant for 209 Court Terrace was served on June 21, at about 4:00 p.m. (R. 16, 21). Eight officers, approximately five of whom were armed with revolvers, conducted the search (R. 17). Several persons were working on numbers slips when the officers entered (R. 194). No one was permitted to leave the premises, although no one was placed under arrest (R. 26, 45, 50). About 7:00 p.m., petitioner entered and about an hour afterward had an attorney present, who was permitted to come in for the purpose of consulting with petitioner as to whether to consent to the opening of a safe found in a compartment in an upstairs closet (R. 32-34, 31, 44, 65). After the officers had threatened to open the safe with a crowbar, if necessary, the attorney and petitioner agreed to open it (R. 49, 65). Approximately $5,500 was found therein (R. 44). In addition, approximately $3,500 was found in two cigar boxes in the same closet (R. 48). The money, various items of gambling paraphernalia, and records of gambling transactions were inventoried and seized, the search ending at a time variously estimated between 9:30 p.m. and 10:45 p.m. (R. 26, 33).

ARGUMENT

1. There was a substantial basis for crediting the hearsay upon which the search warrant was issued. Lauer, the person furnishing the information on which the Treasury agent's affidavit was based, also presented documentary records of numbers transactions; and these were of such a character that they could scarcely have been fabricated. The fact that petitioner was supposed to be engaged in gambling was already known to several agents, named in the record; also, the records at the central office of the Intelligence Division of the Treasury Department at Philadelphia showed that petitioner had admitted he was engaged in gambling in 1952, when he was under prosecution for income tax evasion. The address given by the informant as the residence and place of business of petitioner was verified by reference to his previously filed income tax returns, and it was observed (through surveillance) that a number of people were visiting the two addresses given by the informant.

These factors, separately and together, justified the agent's affidavit that he believed the informant to be reliable. Such a belief does not necessarily have to be grounded on the fact that the person furnishing the information has previously given information which was found reliable. It is enough that the informant's statement be reasonably corroborated by other matters within the officer's knowledge. *Draper* v. *United States*, 358 U.S. 307. In *Jones* v. *United States*, 362 U.S. 257, the Court rejected the conten-

tion that all the information available to the officer making the affidavit which led him to credit the informant be presented to the magistrate, saying (at page 272):

> * * * We have decided that, as hearsay alone does not render an affidavit insufficient, the Commissioner need not have required the informants or their affidavits to be produced, or that Didone [the officer] have personally made inquiries about the apartment, so long as there was a substantial basis for crediting the hearsay.

While all of the facts known to Agent Chiovero in this case were not included in his affidavit, he did set forth that the informant had presented for inspection records of gambling transactions kept by petitioner, which in itself constituted sufficient substantial corroboration of the hearsay information given by the informant.

Neither the informant's general character nor the propriety of his conduct in this transaction is determinative of his reliability as an informant. As was pointed out by Agent Chiovero, on cross examination, the internal revenue office was not interested in the general reliability of Lauer as an individual, but only in the reliability of the particular information he was supplying (R. 60). The agents checked on this information and, with good reason, found it credible.

2. The warrant which was served at approximately 4:00 p.m., was served in the daytime, as required by Rule 41, F. R. Crim. P., *supra*, pp. 4-5. The search was completed, according to the latest estimate, at around 10:45 p.m. On June 21, 1958,

the hour of sunset at Philadelphia, which is in the near vicinity of the premises searched, was 8:33 p.m., Eastern Daylight Time.[1] Inasmuch as darkness is not immediate after sunset, it is apparent that only a comparatively small part of the search took place during the nighttime. As pointed out *infra*, there is no showing that the search was unreasonably prolonged. Moreover, the hour at which the warrant is served is controlling under the Rule. *United States* v. *Bell*, 126 F. Supp. 612, 617 (D. D.C.); *United States* v. *Liebrich*, 55 F. 2d 311 (M.D. Pa.).

3. The search was properly executed. The officers were armed, as is customary, not because violence actually took place or was threatened, but to forestall any violence or the threat thereof. The temporary restriction on the movement of the individuals on the premises was reasonable, in view of the fact that some of them were apparently engaged in numbers transactions when the officers arrived. The coming or going of people could have frustrated the purpose of the search. In any event, such a restriction on ingress or egress does not go to the validity of the search.

There is no showing that the search was unreasonably protracted. There were three floors to be covered, devoted to both business and residential purposes. The difficulty of the search is illustrated by the delay encountered in discovering the safe, which was hidden away in a false floor or compartment in

---

[1] June 21st is next to the longest, if not the longest, day of the year.

an upstairs closet, not found until the latter part of the search.

The money in the safe and in the cigar boxes in the closet was properly seized as an instrumentality used or intended to be used in the gambling operation. *United States* v. *Leveson*, 262 F. 2d 659 (C.A. 5); *United States* v. *$4,298.80*, 179 F. Supp. 251 (D. Md.); *United States* v. *$2,223.40*, 157 F. Supp. 300 (N.D. N.Y.). The use of money as a functional integral part of a gambling operation renders it contraband. *United States* v. *$1,508.46*, 158 F. Supp. 916 (S.D. Ill.).

4. The records of petitioner's gambling transactions, turned over by the informant, were properly used. Congress has authorized payment for information by 26 U.S.C. 7623 (*supra*, p. 4), a statute going back to 1867. The question of the propriety of accepting such evidence has been disposed of by Congress, and is therefore beyond the proper scope of the Court's rule-making power. Cf. *Palermo* v. *United States*, 360 U.S. 343.

The records here involved were not stolen, as claimed by petitioner. Rather, the intention of petitioner clearly was to abandon them. Cf. *Hester* v. *United States*, 265 U.S. 57. The informant, instead of carrying out his instructions to destroy, turned them over to the Treasury authorities. Whatever may be thought of the personal ethical standards of Lauer as an individual, we do not believe that it was improper, particularly in view of 26 U.S.C. 7623, for the government to accept the records which were intended by petitioner to be withheld from it. There

is no implied condition in the Congressional enactment that information revealed by an employee or colleague of an offender may not be accepted. The possibility of false accusation is the real hazard to be guarded against in using evidence provided by an informant. Here, even though the evidence was in the form of documentary records, the agents carefully checked before they used the information.

5. The constitutionality of the taxing statute is not an open question, in view of *United States* v. *Kahriger*, 345 U.S. 22.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

AUGUST 1960.